In the Supreme Court of the United States

OCTOBER TERM 1944.

No. 930.

JOHN J. BOYLE,
County Treasurer of Cuyahoga County;
JOHN A. ZANGERLE,
County Auditor of Cuyahoga County;
BOARD OF COUNTY COMMISSIONERS OF
CUYAHOGA COUNTY, OHIO,
Appellants,

vs.

THE UNITED STATES OF AMERICA
and
FEDERAL PUBLIC HOUSING AUTHORITY.

COUNTY APPELLANTS' BRIEF.

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COUNTY APPELLANTS' BRIEF.

STATEMENT OF THE CASE.

The complaint herein was filed on July 14, 1943 in the United States District Court for the Northern District of Ohio, by the United States of America and Federal Public Housing Authority against the Board of County Commissioners of Cuyahoga County, Ohio, the Auditor and the Treasurer of said County, and the City of Cleveland, a municipal corporation in the county. The relief sought was an order enjoining such defendants from assessing, levying and collecting taxes against premises in the City of Cleveland acquired and used by the Federal Public Housing Authority for low-cost housing purposes, and leased by it for such use and purposes to the Cleveland Metropolitan Housing Authority, a public housing agency created under the laws of Ohio. A motion for an interlocutory order to that

effect was filed therein by plaintiff, and therein it was requested that such motion be heard by a three-Judge Court in accordance with the provisions of Section 266 of the Judicial Code. No factual issue was presented. The facts are set forth in the pleadings and stipulations between the parties, and a finding in accordance thereon was made by the Court. All these appear in the record and need no further mention.

This is an appeal by the county defendants from the judgment of the Special District Court of three Judges which declared such premises to be immune from taxation by the State of Ohio or any of its political subdivisions, because of its ownership by the United States, and ordered the cancellation of taxes levied against such premises during such ownership, and enjoined defendants from collecting such taxes, and from making any further levy. We assert such judgment to be erroneous in holding such land to be immune from taxation and the taxes void.

JURISDICTION OF THE THREE JUDGE COURT.

The question has been raised whether the county appellants, consisting of the County Auditor, County Treasurer and Board of County Commissioners, were acting as officers of the state, or on behalf of the state, within the meaning and purpose of Section 266 of the Judicial Code, in the assessing, levying and collecting of the taxes complained of in this action against the real estate of the plaintiff so as to authorize the convening of the three judge court herein.

Taxes which defendants were enjoined by order of Court in this case from assessing and collecting, consist of separate levies by the County of Cuyahoga, the City of Cleveland, and the Cleveland City School District. The levying or taxing authorities are respectively the Board of County Commissioners of Cuyahoga County, the Council of the City of Cleveland, and the Board of Education of the Cleveland City School District. The assessing and collect-

ing authorities as to all such levies are the County Auditor and the County Treasurer.

On behalf of the appellant county officers we maintain that in the assessing, levying and collecting of the taxes so levied by the Board of County Commissioners, such officers were acting as officers of the State and in the exercise of State functions.

As the taxing authority of the county (General Code Section 5625-1C) the Board of County Commissioners is required to levy taxes for the current operating expenses of the county (General Code Section 5625-3). Such operating expenses include the following:

A. The cost of maintaining the County Judicial system, including all but a minor portion of the salaries of the judges of the Court of Common Pleas and of the Court of Appeals (General Code Sections 5637, 2251, 2252, 2252-2, 2253-2) and including also the salary and expenses of the Clerk of Courts (General Code Sections 2981 and 2993), the Jury Commission (General Code Sections 11419-4, 11419-7 and 11419-43), and the County Probation Department (General Code Section 1554-1).

B. The cost of maintaining and operating the office of the Prosecuting Attorney of the County, who is required "to inquire into the commission of crimes within the County and, except when otherwise provided by law, shall prosecute on behalf of the State all complaints, suits and controversies in which the State is a party * * *" (General Code Section 2914, 2915, 2916, 3003, 3004 and 3004-1).

C. The cost of maintaining and operating the offices of Sheriff, including the maintenance and support of prisoners in the County Jail (General Code Sections 2994, 2981 and 2997).

D. The expense of maintaining the Board of Elections, consisting of four members appointed by the Secretary of State (General Code Section 4785-8), the registration of voters, and the cost and expense of conducting general and county elections (General Code Sections 4785-18 and 4785-21).

This list of functions performed by such local officers on behalf of the State and in conformity with statutes of State-wide application could be extended. However, we believe the foregoing is sufficient to demonstrate that such officers, in the exercise of the taxing power for such purposes, act for and on behalf of the State.

In order that such taxes may be levied the County Auditor is required to assess the real estate in his county for such purposes (General Code Sections 5328, 5625-3 and 5548), and in so doing is under the direction and supervision of the Tax Commission of Ohio (General Code Section 5579). The expense thereof is payable from the county general fund, but the amount allowed therefor may be fixed by the State Tax Commission (General Code Section 5548). An abstract of such assessments setting forth the aggregate amount and valuation of each class of property in the county and in each taxing district therein, as it appears on the auditor's tax list, is required to be certified by such auditor to the State Tax Commission (General Code Section 5612), and is subject to review by the said commission (General Code Section 5613).

Against the tax list thus prepared the auditor is required to extend the tax rate levied by the state, if any, and that levied by the county and other taxing districts therein, as revised by the County Budget Commission, and certify the same to the County Treasurer for collection (General Code Section 5625-23).

Regarding the purpose of the Congress in enacting Section 266 of the Judicial Code it was said in the case of *Connecting Gas Co. v. Imes*, 11 F. (2nd) 191:

> "The mischief at which Section 266 is directed was well understood at the time of its passage. It was the typing up of the operation of an act of a state legislature, or of an order of the state commission, in either case affecting the state at large, [redacted] the operations of the state commission, board or o[redacted]als. It was thought unseemingly that one district judge should be per-

mitted to set aside the deliberate acts of a legislature, or a commission or board of that nature acting for or in the name of a sovereign state."

And in another case the purpose was said to be to make such an injunction "a matter for the adequate hearing and full deliberation which the presence of three judges was likely to secure." *Public Service Commission v. Brashear Freight Lines*, 306 U. S. 204.

From what has been hereinbefore said as to the functions and duties of the public officers mentioned, it appears that the mischief recited in the quotation above made would result from an injunction as contemplated by the act in the circumstances of this case. The effect of enjoining the officers mentioned from assessing property, preparing the tax list, levying the taxes, and collecting the same would prevent such officers from performing duties imposed upon them by acts of the legislature for the benefit of the entire State of Ohio and deny to the state the benefits of such revenue. Such an order, we submit, granted by a single judge and having such wide spread effects upon the exercise of the sovereign power of the State, is the very mischief to remedy which the act was passed.

It has been fully recognized by this Court that the mere fact that the officer against whom the order is sought is a local officer rather than a state officer is not in all circumstances determinative of the question of jurisdiction. In the case of *ex parte*: *In the matter of the Public National Bank of New York*, 278 U. S. page 96, in which the action was one to enjoin said tax officers, the Court said:

"Our attention is directed to several cases disposed of under Section 266 where the court passed on the merits although the suits were against local officers. We do not stop to inquire whether, at least in some of these cases, the so-called officers in fact represented the state or exercised state functions in the matters involved and properly might be held to come within the provisions of section 266 now under review."

And so in the case of *Rorich v. Everglades Drainage District*, 307 U. S. 208, this Court recognized that a local officer may in enforcing a statute which embodies a policy of state-wide concern, be performing a state function within the meaning of section 266 of the Judicial Code, though he is localized by his geographic activities and the mode of his selection, and the Court in such case recognized also that though the officer be a state official charged with a duty under a statute not of state-wide concern, but one having application exclusively to a particular district of the State that with respect to such functions the official is not a state functionary within the meaning of that section.

In the case of *Spielman Motor Sales Co. Inc., v. Dodge*, 295 U. S. 89, suit was brought to restrain the district attorney of New York County from instituting a criminal prosecution for an alleged violation of a Code of Fair Compensation under a state law alleged to violate the Federal Constitution. The Court held in such case that such suit was within Section 266 of the Judicial Code requiring suits for an interlocutory injunction to restrain the enforcement of a state statute by any officer of the state to be heard by three judges, "the district attorney being an officer of the state within the meaning of that provision and the statute attempting to establish a state-wide rather than a merely local policy."

While it is true that under the laws of the State of Ohio these officers are regarded as county officers, by reason principally of their being elected by the voters in each county, it cannot be surmised that Congress in enacting Section 266 and in using the term "state officers" intended that such term should apply only to such officers in each state as under the system of each such state was designated a state officer. Manifestly such application of the term would lead to opposite results in different states. It seems clear that the Congress intended such designation of state

officer to mean one who was charged with the performance of state functions.

We therefore say with respect to these officers, what was said in the *Spielman* case above referred to, of the district attorney of New York:

> "In this view we cannot regard the local description, or the method of selecting the officer as decisive with respect to the application of section 266 of the Judicial Code * * * to determine the application of this provision, we must have regard both to the nature of the legislative action which is assailed and to the function of the officer who is sought to be restrained."

And again in such case it was said:

> "Where a statute embodies a policy of state-wide concern an officer, although chosen in a political subdivision and acting within that limited territory, may be charged with the duty of enforcing the statute in the interest of the state and not simply in the interest of the locality where he serves. This is especially true in the case of a prosecuting attorney who acts for the entire state, as a part of its machinery of enforcement, in proceedings against violators of the state's statute. The functions of such an officer, in enforcing a statute of general application, is of controlling importance in giving effect to the intent of the Congress. * * * In that enforcement, he is acting in a true sense as an officer of the State."

In the *Public National Bank of N. Y.* case, 278 U. S. 100, 73 L. ed. 202 the taxes were levied by the officers of the city "*and for the sole use of the city,*" and for that reason this Court held that the suit was not within the provision of Section 266 requiring a three-judge court.

Likewise in *Rorich v. Board of Commissioners of Everglades Drainage District*, 307 U. S. 208, 83 Law Ed. 1242, the subject of the action was taxes levied for the benefit of a local drainage district under an act of the legislature establishing that particular district only and conferring upon it power to levy such taxes. The Court held that a

three-judge court can be involved only in a suit involving a statute of general application as distinguished from one affecting a particular municipality or district.

These cases are plainly inapplicable to the facts in this case.

We respectfully submit that in respect of the assessment levying and collecting the taxes herein complained of against the real estate of the plaintiff and for the purposes hereinbefore enumerated, the board of county commissioners, the county auditor and the county treasurer were in the exercise of a duty charged upon them by a general statute applicable to all counties in the State, embodying a policy of state-wide concern and in the interest of the State, and that in so doing they were acting for and on behalf of the State and not in the interest of the county only.

ARGUMENT.

The Acquisition and Use of Lands by the Federal Government for Low Cost Housing and Slum Clearance, Was Not the Exercise of a Power in Respect of Which it is Sovereign, and Therefore May Not Be Exercised in Derogation of the Sovereign Power of the State to Tax Such Lands.

This Court has repeatedly declared the property of the Federal government and the instrumentalities or means necessary or proper for carrying out the powers of the Federal government, to be immune from taxation by the States. Whether there is any limitation to this rule, and if so, what it is, has, we believe, never been decided. In the absence of some limitation thereof, the destruction of the sovereignty of a state through the destruction of its power to tax is but a matter of the extent to which the Federal government acquires land therein. We believe there is a limitation and that such limitation grows out of the same considerations and necessity that gave use to the rule—the preservation of the sovereignty of the Federal government and the states within their respective spheres.

In the celebrated case of *McCulloch v. Maryland*, Chief Justice Marshall said:

> "This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist."

The case at bar illustrates the truth of Justice Marshall's prophecy.

It is a mere commonplace to say, but it seems necessary to do so, that in our Federal System of government,

the general government is sovereign in some fields of governmental powers and the states in others. And as said in *Ableman v. Brooks*, 62 U. S. 506, 16 L. Ed. 169:

> "While the power of the general government and of the state both exist and are exercised within the same territorial limits, they are separate and distinct sovereignties."

The essence of these principles derived from our Constitution is that in the sphere in which the Federal government is sovereign, the states must bow to it. In the field in which the states are sovereign, the Federal government must yield. The courts have ever been mindful of their responsibilities in the preservation of the rights of both the Federal and State governments.

In the case of *Texas v. White*, 7 Wall. 700; 19 L. Ed. 237, Chief Justice Chase said:

> "The preservation of the states and maintenance of state government are as much within the design and care of the constitution as the preservation of the union and the maintenance of the national government. The constitution, in all its provisions, looks to an indestructible union, composed of indestructible states."

Immunity from taxation is an attribute of sovereignty. The subjection of the property of the sovereign to taxation by another power is incompatible with, and a denial of its sovereignty. Likewise the right to tax is an attribute of sovereignty, and any interference with that right is incompatible with and a denial of its sovereignty in that respect. The so-called doctrine of immunity from taxation of property of the sovereign grew out of our Federal system as one necessary to the protection of the powers of the states and of the general government in the fields in which they respectively are sovereign, and is limited by the extent of such sovereignty. Hence it has no application where the property proposed to be taxed is not held or used in the

exercise of a sovereign power. This was the basis of the decision in *State of Ohio v. Helvering*, 292 U. S. 360, 78 L. Ed. 1311, in which it was held that a State engaging in the business of selling liquor is not immune from the Federal excise tax, because in carrying on such business the State was not in the exercise of a sovereign power. To hold otherwise would deny the sovereignty of the taxing power, and in a large measure destroy it, thus defeating the purpose of the doctrine.

Carter v. Carter Coal Co., 298 U. S. 238, 80 L. Ed. 1160, p. 1180:

> "While the states are not sovereign in the true sense of that term, but only quasi-sovereign, yet in respect of all powers reserved to them they are supreme—'as independent of the general government as that government within its sphere is independent of the States.' *Collector v. Day* (*Buffington v. Day*), 11 Wall. 113, 124, 20 L. ed. 122, 125. And since every addition to the national legislative power to some extent detracts from or invades the power of the states, it is of vital moment that, in order to preserve the fixed balance intended by the Constitution, the powers of the general government be not so extended as to embrace any not within the express terms of the several grants or the implications necessarily to be drawn therefrom."

It is evident therefore that the question presented by this case does not involve the constitutionality of the act of Congress providing for low-cost housing and slum clearance, but only whether the power exercised by the general government in pursuance of such acts of Congress, in acquiring large areas of land in the several states and in the erection thereupon of low cost housing, thereby effecting slum clearance, is a power of the general government in respect of which it is sovereign.

The states remain sovereign within their separate spheres as to all powers not delegated to the general gov-

ernment or prohibited to the states. Subject to these restrictions each state is supreme and possesses the exclusive right of regulating its own internal affairs, and in all such matters is sovereign so long as it does not conflict with the Federal Constitution. In general, the states may exercise any power possessed by them prior to the adoption of the Constitution, unless the exercise of such power is expressly or by necessary implication prohibited thereby, or interferes with the exercise of some power delegated to the United States. Under our system of government the powers of sovereignty are divided between the Federal and State governments. They are each sovereign with respect to the rights committed to it, and neither sovereign with respect to the rights committed to the other. *McCulloch v. Maryland*, 4 Whea. 316, 4 L. Ed. 579. *Texas v. White*, 7 Wall. 700, 725, 19 L. Ed. 227, 237. *Opinions of Justices*, 14 Gray 614, 616.

The acts of Congress under which the lands in question were acquired, held and improved for low cost housing and slum clearance projects recite that the authority thus exercised by Congress was in pursuance of the general welfare provision of the Constitution.

Much has been said and remains to be said about the nature and extent of the power conferred upon Congress by Art. 1, Sec. 8, Clause 1 of the Constitution.

Mr. Justice Story in his work on the Constitution (Vol. 1, 4th Cooley Edition) said:

> § 907. "Before proceeding to consider the nature and extent of the power conferred by this clause, and the reasons on which it is founded, it seems necessary to settle the grammatical construction of the clause, and to ascertain its true reading. Do the words, 'to lay and collect taxes, duties, imposts, and excises,' constitute a distinct substantial power; and the words, 'to pay the debts and provide for the common defence and general welfare of the United States,' constitute another distinct and substantial power? Or are the

latter words connected with the former so as to constitute a qualification upon them? This has been a topic of political controversy, and has furnished abundant materials for popular declamation and alarm. If the former be the true interpretation, then it is obvious that under color of the generality of the words, to 'provide for the common defence and general welfare,' the government of the United States is, in reality, a government of general and unlimited powers, notwithstanding the subsequent enumeration of specific powers; if the latter be the true construction, then the power of taxation only is given by the clause, and it is limited to objects of a national character, 'to pay the debts and provide for the common defence and the general welfare.'"

§ 908. "The former opinion has been maintained by some minds of great ingenuity and liberality of views. The latter has been the generally received sense of the nation, and seems supported by reasoning at once solid and impregnable."

And in further exposition of his views as to the proper interpretation of this proposition he quotes with approval the following by Mr. Jefferson:

"To lay taxes to provide for the general welfare of the United States is," says he, "to lay taxes for *the purpose* of providing for the general welfare. For the laying of taxes is *the power*, and the general welfare the *purpose* for which the power is to be exercised." 1 *Story on the Constitution*, Sec. 926—Cooley's 4th Ed.

The views thus expressed have found approval and acceptance by this Court over a period of many years. In *U. S. vs. Butler*, 297 U. S. 1, 80 L. Ed. 478, it is said:

"The power conferred by Article 1, § 8, Clause 1, of the Federal Constitution to lay and spend taxes to provide for the general welfare, is not restricted to the enumerated legislative fields committed to Congress by the other provisions of the article, but confers a substantive power to tax and appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare."

The qualification attached to the grant of power to levy and spend taxes, that it shall be for the general welfare, cannot be construed to be a delegation to the United States of the power of each state to provide for the welfare of its citizens.

The power delegated by this provision is the power to tax. It does not delegate to the United States power to make laws for the general welfare. *Carter vs. Carter Coal Co.*, 298 U. S. 238, 292; 80 L. Ed. 1160, 1179. So that the states each retained the power to provide for its own welfare. None of the soverign powers of the states were subjected to any limitation or restriction by a delegation to the general government of power to provide for the general welfare, because no such grant was made. It follows therefore that the exercise and operation of the sovereign powers of the state may not be limited or destroyed by the Federal Government in the use of its powers to levy and expend taxes for the general welfare.

It appears from the admitted facts in this case that in carrying out its low cost housing and slum clearance projects in the City of Cleveland, the Federal Public Housing Authority has acquired large tracts of land and erected thereupon buildings containing residence for thousands of occupants and in some projects retail stores to provide shopping facilities for the tenants and for the general public.

These lands, like all other lands in the state, have always heretofore been subjected to taxation by the laws of the state, for the purpose of providing revenue to defray the expenses of local government, including therein governmental, educational, utility and benevolent services, benefits and facilities.

The right of the state through its local political subdivision to continue the exercise of its sovereign power to levy taxes upon such lands for the purpose of local government is denied by the plaintiffs. It is asserted that the

state has lost its right so to tax the lands so acquired by the Federal government because of the latter's ownership thereof.

The cases decided by this Court which are authority for the proposition that property owned by the Federal government is not subject to taxation by the state, will upon examination be found to be cases in which the property sought to be subjected to State taxation was owned by the Federal government by virtue of the exercise of a delegated power. Thus in the case of *McCulloch v. State of Maryland* the question was whether the State might impose a tax upon notes issued by the Bank of the United States. It was held that the creation of the Bank of the United States was within the power of the Federal government as a means appropriately adopted to carrying into execution a sovereign delegated power and that the state had no power to tax the means employed for the execution of its powers.

Likewise in the case of *Van Brocklin v. Anderson*, 117 U. S. 151; 29 L. Ed. 845, it was held that lands situated in a state which were acquired by the United States through sales for direct taxes levied pursuant to an Act of Congress, are not subject to state taxation while so owned by the United States.

Here the sovereign power exercised was the power delegated to the United States to levy and collect taxes and it was in the exercise of that power that the land was acquired and held.

In many of the cases cited in the *Van Brocklin* case the lands sought to be taxed were public lands of the United States owned by it in its sovereign capacity. And so in many of the other cases the land was owned by the United States for use as a post office, a mint. The principle of those cases is that in the field of the sovereign and exclusive powers of the Federal government its exercise thereof is not and may not be impeded, limited or restricted by the

action of the state in the exercise of its sovereign power to tax lands within its territorial limits. Such cases hold consistently with the doctrine herein urged, that the Federal government within the field of its sovereign and exclusive sovereignty is not limited by or subject to the sovereign power of the states, but is supreme. We have not been able to examine all of the cases on this subject, but all that we have thus far examined are cases in which the Federal government was in the exercise of a sole and exclusive sovereignty and for that reason and upon that ground the property was held immune from taxation.

The case here is quite otherwise. It is contended here only that the Federal government may not exercise the authority to acquire land conferred upon it by such acts of Congress referred to, so as to cut down and take away from the state the sovereign power vested in it and which it has already exercised, to subject lands in the state to taxation.

We respectfully submit that in the acquisition of land and buildings for the purpose of providing low cost housing and effecting slum clearance, the Government is not exercising a delegated sovereign power, express or implied. The Constitution was intended to preserve and protect the sovereign powers of the United States and the states respectively. The doctrine of the immunity of one sovereignty from taxation by another is a necessary concomitant of this system of dual sovereignties; necessary to the protection of each, for as was said in the *McCulloch* case and reiterated in many cases since, "the power to tax is the power to destroy." However, if it be held that the authority exercised in the circumstances of this case is a sovereign power of the Federal government and that the land and buildings acquired by it in pursuance thereof are thereby withdrawn and excluded from the exercise by the state with respect thereto of its sovereign right to levy taxes, then we must take account of the effect of another prin-

ciple, to-wit: That the power to exclude the state from the exercise of its taxing power, is the power to destroy the state. And thus we have the paradox that the very thing sought to be withheld from the Federal government by the provision of the Constitution—the power to destroy the state—has been conferred upon it.

Mr. Justice Stone in his opinion in *Helvering v. Gerhardt*, 304 U. S. 405, 414, in commenting on the case of *Buffington v. Day*, 11 Wall. 113, 20 L. Ed. 122, in which the salary of a state officer was held to be immune from Federal income tax, used language which we believe to be entirely applicable to this case, as follows:

> "The question there presented to the Court was not one of interference with a granted power in a field in which the Federal government is supreme, but a limitation by implication upon the granted Federal power to tax. In recognizing that implication for the first time, the Court was concerned with the continued existence of the states as governmental entities, and their preservation from destruction by the national taxing power. The immunity which it implied was sustained only because it was one deemed necessary to protect the states from destruction by the Federal taxation of those governmental functions which they were exercising when the Constitution was adopted and which were essential to their continued existence."

The evils arising from the exercise of this authority by the government in the acquisition of lands and buildings and stores in connection therewith to minister to the needs of the inhabitants, and withdrawing them from the operation of the states taxing laws, are matters of common knowledge and of serious moment. Communities have had hundreds and thousands of families thrust upon them with the necessity of supplying them with all the customary services necessary to live in large communities, such as sanitary systems, water systems, fire protection, police protection and all the numerous public services and facilities

such as the provision of health and nursing service, poor relief, parks, playgrounds, libraries, the maintenance of streets and street lighting, and all the protection, benefits and privileges accruing from the powers of the state. All these services are community paid for in large part out of revenues derived from taxes levied on the premises occupied by the inhabitants of the community. Would the sovereignty of the United States be impaired or its means of functioning in this capacity, if it choose to do so, be unreasonably impeded, by subjecting such lands and buildings to the same rate of taxation as other properties in the community?

The evils arising from slum conditions and unsanitary and unhealthful housing are grave. It is desirable that they be eliminated, if possible, by providing proper housing. But it will not we are sure be urged for one moment that they are in their nature, matters which are beyond the power of the separate states to relieve so far as they exist within their own borders. Within their respective jurisdiction the states have as much power to provide a remedy as the Federal government and the same remedy. The acts of Congress under discussion themselves recognize the sufficiency of the sovereign power of the states in this matter by providing for Federal financial grants and loans in aid of such projects carried on by public housing agencies created by the states, and for the operation of such Federal projects by public housing agencies so created. Grants or loans in aid are a familiar method used by the Federal government to aid the states in numerous matters, such as roads and schools and other activities, and are not in any sense confined to the realms in which the Federal Government is supreme. Indeed legislation of the same general character and to reach the same evils has been enacted by the several states, and in some cases before the Federal government acted, notably Massachusetts which amended its Constitution in 1915 so as to confer power on its legisla-

ture to provide therefor. So that we say this power to provide low cost housing and slum clearance is one which may be concurrently and independently exercised by the Federal government and the states.

If, however, in the exercise of such power the Federal government substantially cripples and destroys the powers of the local government by the curtailment and destruction of the sovereign power of the state to levy taxes, it likewise destroys the power of the state to itself remedy the conditions giving rise to the evil.

In the application of the principle here urged no right is claimed, nor do we think the principle urged admits of it, to tax the assets of the Federal Public Housing Authority other than the land and buildings. Likewise the application of this principle would not permit taxation by the state of the assets of such Federal instrumentalities as the Home Owners' Loan Corporation of the Reconstruction Finance Corporation or the Federal Land Banks, which too are instrumentalities designed to promote the general welfare. The assets of these corporations other than lands acquired by them in the states would not come within the application of the rule contended for because the operation of such instrumentalities in the pursuit of their functions does not result in the cutting down of the sovereignty of the state or in the taking away from the state, its sovereign power with respect to taxation. The assets of such corporations other than the land acquired by them, consisting, it is to be assumed, of funds appropriated to the use of the several instrumentalities from the tax revenues of the United States, are funds and properties of the sovereign power of the United States and, therefore, never were and never can become subject to the sovereign power of the state. For that reason the denial of the power to tax such property is no infringement upon the sovereign power of the state. And even though such instrumentalities translate such funds into mortgage loans or other securities,

such mortgages or securities thus acquired with the funds appropriated to the use of the instrumentality by the Federal government, have never been the subject of the taxing power of the state, nor could be, and therefore the holding of them immune from taxation constitutes no infringement upon the sovereignty of the states. *Pittman vs. Home Owners' Loan Corp.*, 308 U. S. 21, 60 S. Ct. 15, 84 L. Ed. 11.

Respecting the Provision in the Act of Congress That Property Acquired for Low Cost Housing and Slum Clearance Shall be Exempt From Taxation by the States.

We have thus far given no consideration to the contention made by plaintiff that the acts of Congress under consideration expressly provide that the property and lands of the Housing Authority shall be exempt from taxation by the states and that such acts were effective for that purpose.

The basis of this argument must be that the Federal government is possessed of two distinct powers with respect to immunity or exemption from taxation of property owned by it, first, its immunity arising as an attribute of its sovereignty, and second, its exemption derived from the declaration of Congress to that effect.

We believe this argument is sufficiently answered by saying that if, as plaintiff argues in its brief, immunity attaches to all property owned by the Federal government or its instrumentalities, regardless of the nature of the power exercised in the ownership thereof, that manifestly any act of Congress on that subject would be merely declaratory of the immunity and not the occasion of it.

We submit Congress is without power to exempt property of the Federal government from taxation by the states. Nor can there be any need or occasion for its having or exercising such power, since immunity from taxation is of the essence of sovereignty and an attribute thereof. To

say that Congress can confer immunity, is tantamount to saying that Congress has power to confer sovereignty.

Congress may however submit property of the Federal government to taxation by the states and has done so. Similarly Congress has in many acts declared that property acquired in pursuance thereof shall be immune from taxation by the states. Such acts, it seems to us, are but declarations by Congress that such property is the property of the sovereign and so entitled to exemption, and further expressing its determination that such immunity shall not be waived.

If therefore this Court sustains our contention that the lands in question were not acquired and used in the exercise of sovereignty and hence are not immune from taxation, the declaration of Congress respecting immunity is without effect.

We respectfully submit that the Court below erred in holding the land exempt from taxation and the tax levies void.

Would the Land in Controversy be Taxable Even if the Federal Housing Act of 1937 Were Unconstitutional?

This memorandum is submitted upon the Court's suggestion that the question above stated be discussed by counsel in their briefs.

It seems to us the answer to this question must be found in the determination of this Court on appellants' fundamental contention in this case that it is only when land is acquired or used by the Federal government in the exercise of its sovereign power that it draws to it immunity from taxation by the State.

If the Housing Act is held to be unconstitutional because the Constitution vests no power in Congress to confer upon the executive branch of the government authority to acquire and improve lands for low cost housing and

im clearance, the unlawful and unauthorized acquisition the land cannot have the effect of suspending the right the State to tax the land. Were it otherwise, the legal fect of the exercise by the Federal government of a power hich was not conferred upon it, would be the same as that hich resulted from a constitutional exercise of power. The fference between constitutionality and unconstitutionality ould have vanished. We do not see room for any other nclusions so long as the Federal government holds the nd for such use and such purpose. When however the overnment departs from such unauthorized purpose and evotes the land to a purpose which constitutes the exerse of a sovereign power vested in it by the Constitution, s immunity from taxation by the State attaches.

Based upon these premises we submit as our conclusons on this subject the following:

1. Land owned by the Federal government acquired or used for, the exercise of a sovereign power, is immune from taxation by the State.

2. Land acquired by the Federal government in the xercise of a sovereign power but used for purposes unuthorized by the Constitution, does not thereby lose its mmunity from taxation by the State, because the unuthorized acts of the officers of the government cannot cut own or destroy its sovereignty.

3. Land owned by the Federal government but not equired or used in the exercise of a sovereign power, is not mmune from taxation by the State.

Respectfully submitted,

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